92-1034

No. 92-_____

Supreme Court, U.S.
FILED
DEC 15 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SEMINOLE ELECTRIC COOPERATIVE, INC.,
Petitioner,

vs.

FLORIDA DEPARTMENT OF REVENUE and GERALD R. LEWIS, as Comptroller of the State of Florida,
Respondents.

Petition For Writ Of Certiorari
To The District Court Of Appeal Of Florida
Second District

PETITION FOR WRIT OF CERTIORARI

ROBERT A. MORA
Counsel of Record
RICHARD A. HARRISON
WALLACE B. ANDERSON, JR.
of ALLEN, DELL, FRANK & TRINKLE
Suite 1240, Barnett Plaza
101 East Kennedy Boulevard
Post Office Box 2111
Tampa, Florida 33601
Telephone: (813) 223-5351
COUNSEL FOR PETITIONER

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

57 pp

QUESTION PRESENTED

Whether a Florida tax on the use of interstate transportation services, as applied to the transportation of coal by river barge, fails the four-prong test of *Complete Auto*:

> Where the tax is assessed on one-half the total price of the service, irrespective of the actual mileage the coal is transported within Florida, even though more than 87% of the miles traveled are outside the state and apportionment based on actual mileage poses no insurmountable administrative burden; and
>
> Where the effective tax rate on that portion of the interstate transportation service actually provided within Florida is approximately four times the rate on wholly intrastate transportation services; and
>
> Where the amount of the tax does not vary directly with the actual mileage the coal is transported within Florida.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
A. Statement of Facts	5
B. The Proceedings Below and the Manner in Which the Commerce Clause Challenge Was Raised and Decided	7
REASONS FOR GRANTING THE WRIT	14
I. THE SECOND DISTRICT COURT OF APPEAL'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT ON RECURRING ISSUES CENTRAL TO THE COURT'S COMMERCE CLAUSE JURISPRUDENCE	15
A. The Decision Below Ignores the Fundamental Nature of This Transaction—the Movement of Large, Physical Objects Over Identifiable Routes—and Misapplies the *Goldberg* Exception to Mileage Apportionment	15
B. The Decision Below Fails Even to Consider Whether, in Its Practical Effect, the Tax Discriminated Against Interstate Commerce	19
C. The Decision Below Misapplies Previous Decisions of This Court in Determining That the Measure of the Tax Was Fairly Related to the Benefit of State Services Derived by Seminole Electric	21

II. THE SECOND DISTRICT COURT OF APPEAL'S DECISION PRESENTS NOVEL QUESTIONS OF LAW IN A DEVELOPING SPHERE OF STATE TAXATION THAT TESTS THE EXISTING BOUNDARIES OF THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE 23

CONCLUSION 27

TABLE OF AUTHORITIES

CASES	Page
Amerada Hess Corp. v. Director, Division of Taxation, 490 U.S. 66, 109 S. Ct. 1617, 104 L. Ed. 2d 58 (1989)	19
American Trucking Associations, Inc. v. Scheiner, 483 U.S. 266, 107 S. Ct. 2829, 97 L. Ed. 2d 226 (1987)	11,19,21,23
Armco, Inc. v. Hardesty, 467 U.S. 638, 104 S. Ct. 2620, 81 L. Ed. 2d 540 (1984)	20,23
Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S. Ct. 3049, 82 L. Ed. 2d 200 (1984)	23
Best & Co. v. Maxwell, 311 U.S. 454, 61 S. Ct. 334, 85 L. Ed. 275 (1940)	19
Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 97 S. Ct. 599, 50 L. Ed. 2d 514 (1977)	24
Central Greyhound Lines, Inc. v. Mealy, 334 U.S. 653, 68 S. Ct. 1260, 92 L. Ed. 1633 (1948)	10,24
Commonwealth Edison Co. v. Montana, 453 U.S. 609, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981)	21
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed 2d 326 (1977)	*passim*
Container Corp. of America v. Franchise Tax Board, 463 U.S. 159, 103 S. Ct. 2933, 77 L. Ed. 2d 545 (1983)	18
D.H. Holmes Co. v. McNamara, 486 U.S. 24, 108 S. Ct. 1619, 100 L. Ed. 2d 21 (1988)	21,26
District of Columbia v. Sweeney, 310 U.S. 631, 60 S. Ct. 1082, 84 L. Ed. 1402 (1940)	23
Florida Department of Revenue v. Seminole Electric Cooperative, Inc., 598 So. 2d 115 (Fla. Dist. Ct. App. 1992)	1

Table of Authorities Continued

	Page
Goldberg v. Sweet, 488 U.S. 252, 109 S. Ct. 582, 102 L. Ed. 2d 607 (1989)	9,10,13,15,20
Nippert v. City of Richmond, 327 U.S. 416, 66 S. Ct. 586, 90 L. Ed. 760, 162 A.L.R. 844 (1946)	21
Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602, 71 S. Ct. 508, 95 L. Ed. 573 (1951)	26
Tyler Pipe Industries, Inc. v. Washington Department of Revenue, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987)	23
Westinghouse Electric Corp. v. Tully, 466 U.S. 388, 104 S. Ct. 1856, 80 L. Ed. 2d 388 (1984)	23

OTHER AUTHORITIES

28 U.S.C. §1257	2
1987 Fla. Laws 87-548, §§13, 37	3
Commerce Clause, U.S. Const., Art. I, §8, cl. 3	*passim*
Federation of Tax Administrators, *Sales Taxation of Services*, Research Report No. 135 (Oct. 1990)	24
Fla. R. App. P. 9.125	24
Fla. Stat., §212.059 (1987)	2,3,6
Fla. Stat., §212.0591 (1987)	5,12
Fla. Stat., §215.26(2) (1987)	24
H.B. 325-H	25
Supreme Court Rule 13.1	2
Supreme Court Rule 29.1	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-

SEMINOLE ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

FLORIDA DEPARTMENT OF REVENUE and GERALD R. LEWIS,
as Comptroller of the State of Florida,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Seminole Electric Cooperative, Inc. ("Seminole Electric"),[1] respectfully prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of Florida, Second District, in the case of *Florida Department of Revenue v. Seminole Electric Cooperative, Inc.*, 598 So. 2d 115 (Fla. Dist. Ct. App. 1992).

---

[1] Seminole Electric has no parent or subsidiary corporations, except wholly owned subsidiaries. *See* Supreme Court Rule 29.1.

OPINIONS BELOW

The decision of the Second District Court of Appeal is reported at 598 So. 2d 115 (Fla. Dist. Ct. App. 1992) and is reprinted at 1a.[2] The order of the Second District Court of Appeal denying Seminole Electric's Motion for Rehearing is not reported but is reprinted at 25a. The order of the Supreme Court of Florida declining to review the decision of the Second District Court of Appeal is reported at 605 So. 2d 1265 (Fla. 1992) and is reprinted at 24a. The trial court order declaring that Fla. Stat., §212.059(5) (1987), as applied to Seminole Electric, violated the Commerce Clause, U.S. Const., Art. I, §8, cl. 3, is reported at 47 Fla. Supp. 2d 95 (Fla. Cir. Ct. 1991) and is reprinted at 8a.

JURISDICTION

The decision of the Second District Court of Appeal was rendered on April 10, 1992. By order dated May 13, 1992, the Second District Court of Appeal denied Seminole Electric's Motion for Rehearing. On September 17, 1992, the Supreme Court of Florida entered its order declining to review the decision of the Second District Court of Appeal and declaring that no motion for rehearing would be entertained. This Petition is being timely docketed within ninety days after entry of that order in accordance with Supreme Court Rule 13.1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

---

[2] References to the Appendix are designated as "__ a." References to the record are designated as "R: __."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Art. I, §8, cl. 3:

[The Congress shall have Power] . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .

Fla. Stat., §212.059 (1987) (repealed eff. Jan. 1, 1988):

212.059 Sales and use tax on services.— It is hereby declared to be the legislative intent to levy an excise tax on the sale of services in this state as hereinafter provided. It is further declared to be the legislative intent to levy a complementary excise tax on the use of services in this state as hereinafter provided.

(1)(a) A tax is hereby imposed on the sale at retail of any service in this state at the rate of 5 percent of the sales price of the service. The tax shall be computed on each taxable sale of a service for the purpose of remitting the amount of tax due the state and shall include each and every retail sale of a service.

(b) The sale of a service is in this state for purposes of this part if the service is performed partly within and partly outside this state but the greater proportion of the service is performed within this state, based on costs of performance as defined in s. 212.02.

(2) A tax is hereby imposed on the use of any service in this state when the sale of the service is at retail outside this state, at the rate of 5 percent of the cost price of the service. The use of a service is in this state for purposes of this part if the benefit of the service is enjoyed in this state. For purposes of determining where the benefit of the services is enjoyed, s. 212.0591(9) shall apply.

* * *

(5) Notwithstanding other provisions of this section to the contrary:

(a) Interstate and international transportation services shall be considered sold or used in this state to the extent that the sales price or cost price of the service is apportioned to this state pursuant to paragraph (b).

(b) The sales price of the sale of interstate or international transportation services, or the cost price of the use of interstate or international transportation services, shall be apportioned to the state as provided in this paragraph. There shall be included in the measure of the tax imposed by this part on the sale or use of interstate or international transportation services one-half of the sales price or cost price of the Florida service provider if the point of origin of the transportation service is in Florida, and one-half of said price if the point of termination is in Florida for the service transaction in question. For purposes of this paragraph:

1. "Florida service provider" means the person providing transportation services in Florida regardless of the commercial domicile of such person; and

2. "Point of origin" and "point of termination" mean the physical locations at which the Florida service provider begins or ends movement of the property which is being transported, respectively.

Fla. Stat., §212.0591(2) (1987) (repealed eff. Jan. 1, 1988):

212.0591 Rules of construction.—For purposes of the sales and use tax on services the following rules of construction shall apply:

* * *

(2) If the sales price of the sale of a service or if the cost price of the use of a service cannot be included within the measure of the tax imposed by this part under the Constitution or laws of the United States, there shall be included in the measure of the tax imposed by this part on the sale of services that proportion of the sales price, or on the use of services that proportion of the cost price, that may lawfully be included under the laws and Constitution of the United States.

STATEMENT OF THE CASE

A. Statement of Facts

Seminole Electric operates two coal-fired electric generating plants near Palatka, Florida. Coal used to

operate the plants is purchased from mines located in Illinois and Kentucky. All shipments of coal originate in either Illinois or Kentucky and terminate in Florida. Pursuant to transportation contracts between Seminole Electric and third-party coal transportation companies, coal is transported by barges down the Ohio and Mississippi Rivers to the Gulf of Mexico and through the intracoastal waterway to Port St. Joe, Florida.

The total marine mileage for coal transport is 1,346 miles. The total Florida mileage is 167 miles. The Florida portion of the total mileage is 12.40713%. Beginning July 1, 1987, the State of Florida, through its Department of Revenue (the "Department"), imposed a service sales tax ("tax") on interstate transportation services pursuant to Fla. Stat., §212.059 (1987).[3] In accordance with the statute, a tax of 5% was assessed on interstate transportation services and computed on one-half of the cost price charged to Seminole Electric under contracts with its coal transportation companies.

From July 1987 through December 1987, Seminole Electric paid $12,264,137.20 in coal transportation charges. Of that total amount of services, 50% or $6,132,068.60 was subject to the tax pursuant to the statute. The total tax paid by Seminole Electric for the six-month period the tax was imposed by the Department was $306,603.43. The following table sets forth a mileage comparison and the computation of the service tax involved in this case.[4]

---

[3] The tax was repealed effective January 1, 1988. 1987 Fla. Laws 87-548, §§13, 37.

[4] The Statement of Facts and accompanying table are drawn,

SERVICE TAX ON WATER TRANSPORTATION SERVICES JULY THROUGH DECEMBER 1987

Total Florida Mileage	167
Total Interstate Mileage	1,346
Florida Portion	12.40713%

Total Transportation Charges—July thru Dec. 1987	(1) 50% of Charges	(2) 12.40713% of Charges	Difference (1) - (2)
$12,264,137.20	6,132,068.60	1,521,627.45	4,610,441.15
Service Tax Rate	x 5%	x 5%	x 5%
SERVICE TAX	$ 306,603.43	$ 76,081.37	$ 230,522.06

Rate of Tax on Florida Transportation Services in the Case:

Transportation Services allocated to Florida mileage	1,521,627.45
Service Tax assessed and paid	306,603.43
Service Tax divided by Transportation services	306,603.43 / 1,521,627.45
Effective Rate of Tax (approximately)	20%

B. The Proceedings Below and the Manner In Which the Commerce Clause Challenge Was Raised and Decided.

After paying all taxes assessed by the statute, Seminole Electric filed an application for refund with the Department, asserting that the taxing statute violated

---

nearly verbatim, from the trial court's Final Declaratory Judgment. *See* 8a-10a.

the Commerce Clause insofar as "it was not fairly apportioned, it discriminated against interstate commerce and it was not fairly related to the services provided by the State of Florida." R: 9. That application was denied. Seminole Electric then filed a protest with the Department, reiterating at length its position that the statute violated the Commerce Clause. R: 12-16. The Department rejected Seminole Electric's protest without considering or ruling on its constitutional challenge to the statute.[5]

When its administrative remedies were exhausted, Seminole Electric filed its Complaint for Declaratory Relief and Tax Refund in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County. The Complaint squarely raised the constitutional issue by alleging that the statute violated the Commerce Clause. R: 1-8.

In its Final Declaratory Judgment, the circuit court noted that the issue before it was "whether Florida Statutes §212.059(5) (1987) violates the Commerce Clause of the United States Constitution." 10a. The circuit court observed that under this Court's decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L.Ed 2d 326 (1977), a tax statute will be sustained against a Commerce Clause challenge if the tax:

---

[5] In its decision, the Department stated that "the Florida Department of Revenue, an administrative agency, cannot consider whether a statute is facially unconstitutional and is thus unable to make a determination regarding your protest that Section 212.059(5)(b), F.S. (1987), violates the Commerce Clause of the United States Constitution." R: 25.

1. is applied to an activity with a substantial nexus to the taxing state;

2. is fairly apportioned;

3. does not discriminate against interstate commerce; and

4. is fairly related to the services provided by the state.

The circuit court determined that the tax failed the last three prongs of the four-part *Complete Auto* test.[6]

The external consistency test of fair apportionment[7] asks whether the state has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed. *Goldberg v. Sweet*, 488 U.S. 252, 109 S. Ct. 582, 102 L. Ed. 2d 607 (1989). The circuit court held that assessing the tax on one-half of the total value of the interstate transportation services, regardless of the actual in-state mileage, did not reflect the in-state component of the activity being taxed.

In holding that the statute failed the external consistency test of fair apportionment, the circuit court likened the tax to the gross receipts tax struck down

---

[6] The parties stipulated that the first prong of the test, substantial nexus with the taxing state, was satisfied.

[7] The requirement of fair apportionment comprises the elements of internal and external consistency. The circuit court properly noted that to be internally consistent, a tax must be structured so that if every state were to impose an identical tax, no multiple taxation would result. Seminole Electric admitted that the tax satisfied the test of internal consistency, and the circuit court so held.

by this Court in *Central Greyhound Lines, Inc. v. Mealy*, 334 U.S. 653, 68 S. Ct. 1260, 92 L. Ed. 1633 (1948). In that case, the State of New York attempted to tax the gross receipts of a bus transportation company, even though almost 43% of the mileage for the routes subject to the tax was in New Jersey and Pennsylvania. This Court found that the tax was not fairly apportioned to the business done within New York. Likewise, the circuit court found that Florida was attempting to tax one-half of the total cost of interstate transportation services, even though more than 87% of the miles traveled were outside Florida. Because the statute failed to take into account the actual, in-state mileage traveled by the coal barges, the circuit court concluded, the tax was not fairly apportioned.

The Respondents contended that the tax was fairly apportioned, relying on this Court's decision in *Goldberg v. Sweet*, 488 U.S. 252, 109 S. Ct. 582, 102 L. Ed. 2d 607 (1989). The circuit court rejected Respondents' position, finding their reliance on *Goldberg* misplaced. *Goldberg* involved an Illinois statute that imposed a 5% tax on the gross charges of interstate telecommunications that originated or terminated in Illinois and were charged to an Illinois source address. Whereas *Goldberg* involved the "intangible movement of electronic impulses," the circuit court noted, this case deals with coal barges traversing the Ohio and Mississippi Rivers—"the movement of large physical objects over identifiable routes."

Further, the circuit court observed, *Goldberg* permitted the statute to stand because apportionment based on mileage would have produced an insur-

mountable administrative burden. In this case, the Respondents demonstrated no such burden. The circuit court found that "information was readily available concerning the actual mileage travelled in Florida; thus, there was no real administrative burden" on the Respondents.[8]

The circuit court also found that the tax discriminated against interstate commerce because the effective tax rate on the in-state portion of the transportation was almost four times greater than the rate assessed on wholly intrastate transportation services. Like the flat axle tax that this Court found discriminatory in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 107 S. Ct. 2829, 97 L. Ed. 2d 226 (1987), this tax results in a far greater charge per mile on the in-state portion of the interstate transportation services than on the same transportation services performed wholly within Florida. As the percentage of out-of-state mileage increases, the circuit court found, the effective tax on the in-state mileage (and hence the disparity in the rates assessed on interstate versus intrastate transportation services) increases.

The circuit court also relied on *Scheiner* in holding that the tax failed the fourth prong of the *Complete Auto* test. The amount of tax owed by Seminole Elec-

---

[8] *See* 15a-16a. In the administrative phase of these proceedings, the circuit court noted, the Department's auditor accepted the United States Coast Guard guide for waterway mileage and a shipping company map in determining the number of miles the coal was transported in Florida waters. The circuit court also observed that Florida's sales tax statutes contain other provisions that require apportionment based on actual, intrastate mileage. 16a.

tric does not vary directly with the actual miles traveled in Florida, the court noted, because the tax is assessed based on an arbitrary one-half of the cost of the transportation services.

Having concluded that the tax violated the Commerce Clause, the circuit court next considered the "saving" provision of Fla. Stat. §212.0591(2) (1987). Despite Seminole Electric's contentions that the circuit court could not "rewrite" the unconstitutional tax enacted by the legislature, the court construed the statute to permit the Respondents to assess against Seminole Electric that portion of the tax that would have been due ($76,081.37) had the tax been apportioned based on actual mileage. Accordingly, the circuit court ordered the Respondents to refund the sum of $230,522.06, representing the difference between the total tax paid by Seminole Electric and that portion the court held the Respondents could assess.

The Respondents timely appealed that portion of the decision finding that the tax violated the Commerce Clause; Seminole Electric cross-appealed on the issue of the "saving" clause. The Second District Court of Appeal found that the tax satisfied the *Complete Auto* test in all respects and reversed the circuit court's decision.[9]

In holding that the tax need not be apportioned based on actual mileage, the appellate court first noted that the tax was not a tax on transportation per se, nor on the use of coal, but a tax on the use of a transportation service. Because the tax is computed on the value of the service rendered, the court rea-

---

[9] In light of its ruling, the Second District Court of Appeal did not address the merits of Seminole Electric's cross-appeal.

soned, the tax burden falls on the benefit of the service. The appellate court found that Seminole Electric's "substantial economic benefit" derived from receiving coal to fuel its plants occurred in Florida as a direct result of its use of the transportation service and was "properly taxable where the benefit is enjoyed." 4a.

The court cited only *Goldberg v. Sweet*, 488 U.S. 252, 109 S. Ct. 582, 102 L. Ed. 2d 607 (1989), in support of its conclusion that the tax satisfied the external consistency test of fair apportionment. Although the court's opinion quotes from that portion of *Goldberg* that discusses the administrative burden that would be faced in attempting to apportion interstate telecommunications by actual mileage, the Second District Court of Appeal did not disturb—indeed, it did not even mention—the circuit court's finding that such mileage apportionment here posed no administrative burden for the Department.

To support its conclusion that the tax did not discriminate against interstate commerce, the appellate court noted only that, on its face, the statute appeared to be non-discriminatory. The circuit court's finding that the effective tax rate on the in-state portion of interstate transportation services was approximately four times that on transportation services provided wholly intrastate was not addressed.

Finally, the district court held that because this tax was a general revenue tax, the only benefit to which Seminole Electric is constitutionally entitled is "that derived from its enjoyment of the privileges of living in an organized society. . . ." 7a. Since Seminole Electric enjoys those benefits in Florida, the district court

held that the tax satisfied the last prong of the *Complete Auto* test.

The district court denied Seminole Electric's Motion for Rehearing by order dated May 13, 1992. Seminole Electric's petition for discretionary review was denied by the Supreme Court of Florida on September 17, 1992.

REASONS FOR GRANTING THE WRIT

Under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L.Ed 2d 326 (1977), a tax statute will be sustained against a Commerce Clause challenge if the tax:

1. is applied to an activity with a substantial nexus to the taxing state;

2. is fairly apportioned;

3. does not discriminate against interstate commerce; and

4. is fairly related to the services provided by the state.

Complete Auto signifies this Court's move "toward a standard of permissibility of state taxation based upon its actual effect rather than its legal terminology." *Id.* at 281. This case presents compelling questions involving the scope and proper application of *Complete Auto* and raises issues that test the current boundaries of the Court's Commerce Clause jurisprudence.

I. THE SECOND DISTRICT COURT OF APPEAL'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT ON RECURRING ISSUES CENTRAL TO THE COURT'S COMMERCE CLAUSE JURISPRUDENCE.

A. The Decision Below Ignores the Fundamental Nature of This Transaction—the Movement of Large, Physical Objects Over Identifiable Routes—and Misapplies the *Goldberg* Exception to Mileage Apportionment.

In holding that the tax satisfied the external consistency test of fair apportionment, the Second District relied heavily, if not solely, on this Court's decision in *Goldberg v. Sweet*, 488 U.S. 252, 109 S. Ct. 582, 102 L. Ed. 2d 607 (1989).[10] In the process, however, the appellate court ignored the distinction drawn in *Goldberg* between "the movement of large physical objects over identifiable routes" and the "intangible movement of electronic impulses through computerized networks." Moreover, the trial court's findings that mileage apportionment in this case presented "no real administrative burden" and that information concerning the actual mileage traveled in Florida was "readily available" were undisturbed on

---

[10] No other authority was cited in that portion of the decision below that discussed fair apportionment. The balance of the Second District's discussion of the external consistency test was a lengthy paragraph focusing on "the benefit of the service (i.e., the shipping or the receiving of goods) upon which the tax burden falls," and concluding that Seminole Electric's use of the transportation service "is properly taxable where the benefit is enjoyed." 4a. While this discussion may have some general relevance to the validity of the tax as a use tax or to the nexus requirement (which was not in dispute here), it has no apparent significance to the application of the external consistency test of fair apportionment.

appeal. These findings were not even mentioned in the opinion of the Second District Court of Appeal, despite the great emphasis this Court placed on these factors in *Goldberg*. Thus, the district court ignored one of the fundamental teachings of *Goldberg*—"that the external consistency test is essentially a practical inquiry." 488 U.S. at 264.

In *Goldberg*, the Court considered an Illinois tax of five percent on the gross charges of interstate telecommunications originating or terminating in the state and billed to an Illinois address. The tax was challenged on the ground that the state could properly tax only a fraction of the gross charge based on the actual miles the electronic signals traveled within Illinois.

The Court described in great detail the complex technology underlying modern telecommunications.[11]

---

[11] As the Court observed:

> These cases come to us against a backdrop of massive technological and legal changes in the telecommunications industry. Years ago, all interstate telephone calls were relayed through electric wires and transferred by human operators working switchboards. Today, a computerized network of electronic paths transmits thousands of electronic signals per minute through a complex system of microwave radios, fiber optics, satellites and cables. . . . When fully connected, this network offers billions of paths from one point to another. When a direct path is full or not working efficiently, the computer system instantly activates another path. Signals may even change paths in the middle of telephone call without perceptible interruption. Thus, the path taken by the electronic signals is often indirect and bears no relation to state boundaries. The number of possible paths, the nature of the

These technological realities were not lost on the Court when it considered the external consistency test:

> *In previous cases we have endorsed apportionment formulas based upon the miles a bus, train, or truck traveled within the taxing State. But those cases all dealt with the movement of large physical objects over identifiable routes, where it was practicable to keep track of the distance actually traveled within the taxing State.* See, e.g., Central Greyhound, 334 US, at 663, at 92 L Ed 1633, 68 S Ct 1260 ("There is no dispute as to feasibility in apportioning this tax"); see also Western Live Stock, 303 US, at 257, 82 L Ed 823, 58 S Ct 546, 115 ALR 944. *These cases, by contrast, involve the more intangible movement of electronic impulses through computerized networks. An apportionment formula based on mileage or some other geographic division of individual telephone calls would produce insurmountable administrative and technological barriers.* See Scheiner, 483 US, at 296, 97 L Ed 2d 226, 107 S Ct 2829 (apportionment does not require State to adopt a tax which would "pose genuine administrative burdens"). *We thus find it significant that Illinois' method of taxation is a realistic legislative solution to the technology*

---

electronic signals and the system of computerized switching make it virtually impossible to trace and record the actual paths taken by the electronic signals which create an individual telephone call.

488 U.S. at 254-55 (footnotes and citations omitted).

> *of the present-day telecommunications industry.*

488 U.S. at 264-65 (emphasis supplied, footnotes omitted).

In short, the Second District Court of Appeal paid lip service to *Goldberg*, but applied its rationale in a manner that renders this Court's decision virtually meaningless. The appellate court never explained its implicit (but no less remarkable) determination that coal floating down the Ohio and Mississippi Rivers was more akin to the "intangible movement of electronic impulses through computerized networks" than to "the movement of large physical objects over identifiable routes." Nor can one easily fathom how *Goldberg*—in which this Court emphasized the administrative burden that mileage apportionment would have entailed—could be relied upon to uphold this tax without even addressing the trial court's express finding that no such burden existed.

As the Second District Court of Appeal correctly noted, this Court has "declined to undertake the essentially legislative task of establishing a 'single constitutionally mandated method of taxation.'" *Goldberg*, 488 U.S. at 261 (*quoting Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 103 S. Ct. 2933, 77 L. Ed. 2d 545 (1983)). This Court's restraint in that regard has never been construed, however, to excuse the proper analysis of the tax under *Complete Auto*. "Instead," the Court noted in *Goldberg*, "we determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent." 488 U.S. at 261.

B. The Decision Below Fails Even to Consider Whether, in Its Practical Effect, the Tax Discriminated Against Interstate Commerce.

That the statute may levy a facially neutral five percent tax is not dispositive of the constitutional challenge, because "the Commerce Clause forbids discrimination, whether forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455, 61 S. Ct. 334, 85 L. Ed. 275, 277 (1940). As the Court recently noted, "a tax provision need not be facially discriminatory . . . in order to violate the Commerce Clause." *Amerada Hess Corp. v. Director, Division of Taxation*, 490 U.S. 66, 75, 109 S. Ct. 1617, 104 L. Ed. 2d 58, 68 (1989).

Despite this well-established principle, and notwithstanding the trial court's thorough analysis of the discriminatory impact of the tax, *see* 16a-19a, the Second District Court of Appeal never looked beyond the facial "neutrality" of the statute. Instead, the state court merely cataloged the "neutral" statutory provisions and concluded that:

> *On its face*, section 212.059(5) does not: discriminate against interstate commerce, place greater economic burdens on those outside the state; or grant an economic advantage to Florida residents.

6a (emphasis supplied).

Although the statute does not "allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory," *see American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 281, 107 S. Ct. 2829, 97 L. Ed. 2d 226, 241 (1987), the discrimination against interstate commerce is apparent

when the practical effect of the statute is considered. As the trial court found, the total distance traversed within Florida was 167 miles. If those miles had been part of a wholly intrastate shipment, the effective tax rate on those transportation services would have been five percent. But here, since those same 167 miles were part of an interstate transaction, the effective tax rate almost quadruples. The distance traveled in the state is precisely the same in either case; the variance in the effective tax rate is determined solely as a function of the nature of the commerce involved. As this Court has reiterated on many occasions, "a State may not tax a transaction or incident more heavily when it crosses State lines than when it occurs entirely within the State." *Scheiner*, 483 U.S. at 280; *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642, 104 S. Ct. 2620, 81 L. Ed. 2d 540 (1984).

Because the actual mileage traveled within Florida is readily ascertainable and mileage apportionment poses no administrative burden on the Respondents, such discrimination against interstate commerce should not be tolerated. *See Goldberg v. Sweet*, 488 U.S. 252, 266, 109 S. Ct. 582, 102 L. Ed. 2d 607, 620 (1989) (finding tax not discriminatory, in part, because "exact path of electronic signals can neither be traced nor recorded"). This Court must preserve the "deeper meaning" of the Commerce Clause, *see Scheiner*, 483 U.S. at 281, by looking beyond carefully crafted tax statutes to ascertain whether, in their practical effect, they impermissibly discriminate against interstate commerce. "The great constitutional purpose of the Fathers cannot be defeated by using an apparently neutral 'guise of taxation which produces the excluding or discriminatory effect.' " *Id.*

at 296 (quoting *Nippert v. City of Richmond*, 327 U.S. 416, 426, 66 S. Ct. 586, 90 L. Ed. 760, 162 A.L.R. 844 (1946)).

C. The Decision Below Misapplies Previous Decisions of This Court in Determining That the Measure of the Tax Was Fairly Related to the Benefit of State Services Derived by Seminole Electric.

The fourth prong of the *Complete Auto* test requires that the tax be "fairly related to the services provided by the State." *Complete Auto*, 430 U.S. at 279. The trial court, following this Court's decision in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981), held the fourth prong requires that the measure of tax be reasonably related to the extent of the taxpayer's presence within the state. Applying this concept to the tax on interstate transportation services and using the same reasoning applied by this Court in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed. 2d 226 (1987), the trial court ruled the tax failed the fourth prong of *Complete Auto* because the tax was based on an arbitrary one-half the cost of services performed rather than the number of miles traveled in Florida.

Since the decision in *Scheiner*, this Court has ruled that when a state provides fire and police protection, runs mass transit and maintains public roads, such activities enjoyed by a taxpayer results in taxes paid being "fairly related" to services provided. *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 108 S. Ct. 1619, 100 L. Ed. 2d 21 (1988). This same reasoning was adopted in *Goldberg*.

The requirement in *Scheiner* that the measure of tax be related to the taxpayer's presence in the state

and should be based on mileage in order to pass the fourth prong of *Complete Auto* is distinguishable from the simple test in *D.H. Holmes* based on the respective taxable transactions involved. *Scheiner* involved a flat tax on interstate trucking and a transaction subject to tax by other states through which the trucks traveled. *D.H. Holmes* involved store catalogs printed outside Louisiana but distributed only to customers in Louisiana. The taxpayer in *Scheiner* was subject to multiple taxation based on the mileage its trucks traveled in other states. The taxpayer in *D.H. Holmes* faced no possibility of multiple taxation since all catalogs were distributed in one state. Accordingly, this Court in *Scheiner* took a harder look at the concept of a tax "fairly related" to the taxpayer's presence in the taxing state and determined that, due to the possibility of multiple taxation by other states, the best measure to determine whether a tax was "fairly related" under the fourth prong of *Complete Auto* was one based on mileage.

The same rationale applies in this case. It cannot be denied that other states through which the coal barges pass could tax the services performed in the shipment of coal. Under *Scheiner*, however, such a tax could only be "fairly related" provided the tax was based on the actual mileage traveled within the state. This Court should adopt the *Scheiner* rationale in the present case and determine that the Florida tax was not "fairly related" to the services rendered because the tax was not based on the measure of miles actually traveled within Florida.

II. THE SECOND DISTRICT COURT OF APPEAL'S DECISION PRESENTS NOVEL QUESTIONS OF LAW IN A DEVELOPING SPHERE OF STATE TAXATION THAT TESTS THE EXISTING BOUNDARIES OF THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE.

Respondents will no doubt argue vigorously that the repeal of the tax eliminates any possible need for certiorari to issue in this case. Seminole Electric acknowledges that, absent special circumstances, the repeal of an otherwise offending statute militates against review by this Court. *See, e.g., District of Columbia v. Sweeney*, 310 U.S. 631, 60 S. Ct. 1082, 84 L. Ed. 1402 (1940)(certiorari denied in view of fact that tax statute had been repealed).

This case, however, raises issues that are likely to recur and require decision by this Court as Florida and other states expand the scope of the general sales tax to include taxation of services. A writ of certiorari should be granted to address those issues now, to correct the fallacious reasoning of the Second District Court of Appeal and to establish the proper application of *Complete Auto* in this growing area of state taxation.[12]

---

[12] Much of the Court's Commerce Clause jurisprudence has been developed in cases in which a state's highest court upheld the challenged tax statute only to have its decision reversed by this Court. *See, e.g., Tyler Pipe Indus., Inc. v. Washington Dep't. of Revenue*, 483 U.S. 232, 107 S. Ct. 2810, 97 L.Ed. 2d 199 (1987); *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 107 S. Ct. 2829, 97 L. Ed. 2d 226 (1987) (Pennsylvania statute); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S. Ct. 3049, 82 L. Ed. 2d 200 (1984) (Hawaii statute); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 104 S. Ct. 1856, 80 L. Ed. 2d 388 (1984) (New York statute); *Armco, Inc. v. Hardesty*, 467 U.S. 638, 104 S. Ct. 2620, 81 L. Ed. 2d 540 (1984) (West

In a 1990 report entitled *Sales Taxation of Services*,[13] the Federation of Tax Administrators noted that from 1985 to 1990, at least eighteen states had proposed extending their sales taxes to embrace some services. *Id.* at 5. Although many of these proposals were never enacted into law or resulted in less extensive taxation of services than originally proposed, the trend is clear:

Virginia statute); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 97 S. Ct. 599, 50 L. Ed. 2d 514 (1977) (New York statute); *Central Greyhound Lines, Inc. v. Mealy*, 334 U.S. 643, 68 S. Ct. 1260, 92 L. Ed. 1633 (1948) (New York statute).

Respondents will no doubt also point out that Seminole Electric opposed Respondents' efforts to have the trial court's decision certified for direct review by the Supreme Court of Florida pursuant to Fla. R. App. P. 9.125. Resspondents contended in support of certification that the appeal was "one of great public importance" because, among other things, it involved a tax statute "potentially affecting the tax liability of thousands of persons," and would affect "the funds available to the state treasury . . . and the opportunity of taxpayers to seek a refund." Seminole Electric disputed Respondents' characterization of the appeal as "one of great public importance" because, under Florida law, only those taxpayers who had timely filed for refunds within the three-year statutory limit, Fla. Stat. §215.26(2) (1987), would be entitled to refunds upon finding that the statute was unconstitutional. Since Respondents failed to demonstrate the number of such timely filed refund applications, their implicaton that the decision might have some disproportionate impact on the state treasury was not well-founded. Seminole Electric's statement that the case was not "one of great public importance" was limited to be the points suggested by Respondents. Obviously, Seminole Electric could not anticipate the Second District Court of Appeal's erroneous decision or the issues it would raise.

[13] Federation of Tax Administrators, *Sales Taxation of Services*, Research Report No. 135 (Oct. 1990).

> State legislatures, governors and finance officers will continue to flirt with the idea of extending the sales tax to include some or many consumer services and some or many business services. This flirtation will be consummated in a few states as sales taxes will be imposed on services.

Id. The report even suggests that other states will learn from the economic and political problems that led Florida to repeal the services tax at issue in this case. *Id.* at 9-10.

Moreover, the Florida sales tax on services, like the mythological Phoenix, appears to be rising again from the ashes of its self-destruction. A bill proposing a remarkably similar, broad-based sales tax on services, H.B. 325-H, was introduced during the 1992 legislative session. With respect to the taxation of interstate transportation services, that bill provided:

> . . . [T]he benefit of a transportation service shall be presumed to be enjoyed in this state if both the point of origin and point of termination are located in this state. Half the benefit of a transportation service shall be presumed to be enjoyed in this state if the point of origination or the point of termination, but not both, is located in this state. . . .

H.B. 325-H, §18. While the proposed statute would also have taxed one-half the cost of interstate transportation services originating or terminating in Florida, the drafters of this bill appear to have adopted the Second District Court of Appeal's misplaced reliance on the situs of the "benefit" of the service

being taxed. *See supra* note 10 and accompanying text. Although this bill did not survive committee, it suggests that Florida may well attempt to revive the sales tax on services.

This Court should clarify, now, that taxes on "services" consisting of pure interstate commerce will be subject to scrutiny under *Complete Auto*, irrespective of the nomenclature applied to the tax. To allow a tax statute that directly burdens interstate commerce to escape proper analysis because it has been denominated a tax on "the use of a transportation service" rather than a tax "on transportation" recalls the overly formalistic approach to Commerce Clause jurisprudence that this Court rejected in *Complete Auto*. As the Court recognized in overruling *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S. Ct. 508, 95 L. Ed. 573, (1951), "a focus on that formalism merely obscures the question whether the tax produces a forbidden effect." *Complete Auto*, 430 U.S. at 288.

Although the Court has traditionally found that unapportioned sales and use taxes satisfy the *Complete Auto* test when the risk of multiple taxation is avoided (usually through use of a credit provision), *see D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 108 S. Ct. 1619, 100 L. Ed. 2d 21 (1988) (use tax on catalogs), this tax statute goes beyond any that the Court has heretofore considered. Florida has ventured beyond taxing sales of tangible property and beyond, even, taxing the sales of purely "local" services (*e.g.*, a car wash or a haircut). Florida now seeks to tax the "use" of a "service" that by its very nature consists of and cannot not be viewed apart from the purely interstate activity of transporting coal down the Mis-

sissippi and Ohio Rivers. There is no philosophical, economic or practical reason that this tax should *not* be apportioned based on mileage, despite Florida's efforts to shroud the enactment in the cloak of a general sales and use tax.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should be granted to review the decision of the Florida Second District Court of Appeal.

Respectfully submitted:

ROBERT A. MORA
Counsel of Record
RICHARD A. HARRISON
WALLACE B. ANDERSON, JR.
ALLEN, DELL, FRANK & TRINKLE
Suite 1240, Barnett Plaza
101 East Kennedy Boulevard
Post Office Box 2111
Tampa, Florida 33601
Telephone: (813) 223-5351

Counsel for Petitioner

APPENDIX

APPENDIX A

District Court of Appeal of Florida,
Second District.

No. 91-01145.

The FLORIDA DEPARTMENT OF REVENUE and Gerald R. Lewis, as Comptroller of the State of Florida,
Appellants/Cross-Appellees,
v.
SEMINOLE ELECTRIC COOPERATIVE, INC., a Florida Corporation,
Appellee/Cross-Appellant.

April 10, 1992.

Rehearing Denied May 13, 1992.

Robert A. Butterworth, Atty. Gen., and Kevin J. ODonnell, Asst. Atty. Gen., Tallahassee, for appellants/cross-appellees.

Wallace B. Anderson, Jr., and Robert A. Mora of Allen, Dell, Frank & Trinkle, Tampa, for appellee/cross-appellant.

PATTERSON, Judge.

The Department of Revenue appeals a final judgment of the trial court declaring that section 212.059(5), Florida Statutes (1987)[1], as applied to Seminole Electric Cooperative, Inc., violates the Commerce Clause of article I, section 8 of the United States Constitution. We reverse.

---

[1] Section 212.059, Florida Statutes (1987), the services tax, was repealed, effective January 1, 1988. Ch. 87-548, §§ 13, 37, Laws of Fla.

Seminole Electric is a Florida corporation whose principal place of business is in Hillsborough County, Florida. It operates two coal-fired electric generating plants near Palatka, Florida. Coal used to operate the plants is purchased from mines located in Illinois and Kentucky, with shipments originating in either state and terminating in Florida. Pursuant to transportation contracts between Seminole Electric and third-party coal transportation companies, coal is transported by barges down the Ohio and Mississippi Rivers to the Gulf of Mexico and through the intercoastal waterway to Port St. Joe, Florida. The total mileage for transporting coal is 1,346 miles, with 167 miles, or 12.40713%, being within Florida.

Pursuant to section 212.059, Florida Statutes (1987), a services tax of five percent was assessed on these transportation services. This tax was computed on one-half of the transportation charges Seminole Electric paid under contracts with coal transportation companies, regardless of the number of miles the coal was transported in Florida. From July 1987 through December 1987, Seminole Electric paid $12,264,137.20 in such transportation charges. Of that total amount fifty percent, or $6,132,068.60, was subject to tax. The total tax Seminole Electric paid, pursuant to authority granted to it to self-accrue tax, for the six-month period the tax was imposed was $306,603.43.

Seminole Electric applied for a tax refund under section 215.26, Florida Statutes (1987). This request was denied. After filing a protest and additional refund request, it then brought this action for declaratory relief and a refund of the tax.

The now-extinct "services tax" is both a sales and a use tax. Section 212.059 imposes a general tax on the sale or use of services consumed or enjoyed within the state. A sale is deemed to occur in the state when more than fifty percent of the service is performed within the state based on costs of performance. § 212.059(1)(b), Fla.Stat.

(1987). A use of a service is deemed to occur in the state when the sale of the service takes place outside the state and the service is consumed or enjoyed within the state. § 212.059(2), Fla.Stat. (1987). In regard to interstate transactions, a credit is provided for sales and use taxes paid to other states, thereby eliminating the imposition of double taxation. § 212.06(7), Fla.Stat. (1987). Under the laws of this state, the tax imposed under section 212.059 is constitutional on its face. *See In re Advisory Opinion to the Governor,* 509 So.2d 292 (Fla.1987).

A tax statute will withstand a Commerce Clause challenge if "the tax is applied to an activity with a substantial nexus to the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit Inc. v. Brady,* 430 U.S. 274, 279, 97 S.Ct. 1076, 1079, 51 L.Ed.2d 326, 331 (1997).[2] Seminole Electric contended, and the trial court determined, that the tax failed the last three prongs of the test. We disagree and hold that section 212.059(5) meets the *Complete Auto Transit* test, as explained below.

FAIR APPORTIONMENT

This test measures whether a state taxes only its fair share of an interstate transaction. To meet this standard, a tax must be both internally and externally consistent. *Goldberg v. Sweet,* 488 U.S. 252, 261, 109 S.Ct. 582, 588, 102 L.Ed.2d 607, 616 (1989). An internally consistent tax is structured so that no multiple taxation results if every state imposes the identical tax. 488 U.S. at 261, 109 S.Ct. at 589, 102 L.Ed.2d at 617. Seminole Electric concedes that this tax passes the internal consistency test because there is no possibility of multiple taxation. A tax such as this can only be assessed by a state which is the point of

---

[2] The parties agree that section 212.059(5) meets the "nexus" prong of the test, and we have not included it in our discussion that follows.

origin or the point of termination of the interstate transportation service. This tax is then imposed on only one-half of the transportation charge. Any possibility of multiple taxation is further cured by the credit provision of section 212.06(7), as the trial court correctly ruled.

With respect to external consistency, the *Goldberg* Court stated that the "test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the instate component of the activity being taxed." 488 U.S. at 262, 109 S.Ct. at 589, 102 L.Ed.2d at 617. Seminole Electric urges, and the trial court held, that section 212.059(5) fails the external consistency test because Florida does not prorate the tax based on the number of miles actually traveled through Florida versus the total number of miles in transportation. We do not agree.

This is not a tax on transportation per se. Neither is it a tax on the use of coal.[3] It is a tax on the use of a transportation service. When the point of origin and point of termination of transportation services are both within Florida, the tax is not computed on the number of miles traveled; rather, it is computed on the value of the service rendered. Thus, it is the benefit of the service (i.e., the shipping or the receiving of goods) upon which the tax burden falls. Under this application, the distance traveled or the mode of transportation is irrelevant. Seminole Electric derives a direct and substantial economic benefit by receiving coal to fuel its generating plants. That benefit which occurs in Florida is the direct product of the use of the transportation service. Accordingly, it is properly taxable where the benefit is enjoyed.

The parties have done exhaustive research but, because of the unique nature of this tax, have been unable to

---

[3] Section 212.08(4)(a)(2), Florida Statutes (1987), exempts coal from use tax when it is used by a rural electric authority.

provide us with any authority upon which we can directly rely. *Goldberg,* however, is helpful in our analysis. There, the State of Illinois imposed a five percent tax on the gross charges of interstate telecommunications originating or terminating in the state and charged to an Illinois service address. As in the case of our services tax, a credit was provided upon proof that another state taxed the same call. The Illinois tax was challenged on the ground that the state could tax only a fraction of the gross charge of each telephone call based on the miles the electronic signals traveled within Illinois.

In determining that the tax met the external consistency test and was fairly apportioned, the Court observed "that the external consistency test is essentially a practical inquiry." 488 U.S. at 264, 109 S.Ct. at 590, 102 L.Ed.2d at 619. The *Goldberg* Court determined that administrative and technological burdens would not allow apportionment by the miles the electronic impulses traveled for each telephone call. The Court distinguished mileage apportionment cases involving vehicles travelling over measurable courses. However, the Court also reasserted its long-recognized view that the Constitution does not require states to use a single apportionment formula, and "therefore [we] have declined to undertake the essentially legislative task of establishing a 'single constitutionally mandated method of taxation.' " 488 U.S. at 261, 109 S.Ct. at 588, 102 L.Ed.2d at 616 (quoting *Container Corp. of America v. Franchise Tax Bd.,* 463 U.S. 159, 171, 103 S.Ct. 2933, 2943, 77 L.Ed.2d 545, 557 (1983)).

In the present case, the use tax is apportioned between the two states with nexus, the state of origin and the state of termination. The tax is measured by the value of each transaction and collected from the ultimate consumer—the consumer who enjoys the benefit of transportation services by shipping or receiving goods. We conclude that section 212.059(5) satisfies the external consistency test and is fairly apportioned.

SECTION 212.059 DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE

We next consider the third prong of the *Complete Auto Transit* test, the impact on interstate commerce. Section 212.059(5) provides:

> — the same tax burden on out-of-state transportation services terminating in Florida as it does on the "Florida service provider" engaging in interstate commerce with a point of origin in this state;
>
> — no preferences, credits, or other commercial advantages to Florida residents, consumers, or Florida service providers engaged in interstate commerce;
>
> — a tax on the full sales price of transportation services where both the point of origin and point of termination are wholly within Florida;
>
> — a tax on fifty percent of the full sales price of such services where either the point of origin *or* the point of termination are in Florida; and
>
> — a full credit for taxes paid to other states on the same sale or use, pursuant to section 212.06(7), Florida Statutes (1987).

On its face, section 212.059(5) does not: discriminate against interstate commerce; place greater economic burdens on those outside the state; or grant an economic advantage to Florida residents. Therefore, it is not unconstitutional for any of these traditional reasons. *See McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565 (1940);*South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734 (1938).

THE TAX IS FAIRLY RELATED TO SERVICES PROVIDED BY THE STATE OF FLORIDA

The final prong of the *Complete Auto Transit* test requires that the measure of the tax be fairly related to the

benefit of state services derived by Seminole Electric. This tax is a general revenue tax, as distinguished from a user fee which is imposed to support specific state facilities or services. In regard to a tax such as this, "[t]he only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes." *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 623, 101 S.Ct. 2946, 2956, 69 L.Ed.2d 884, 897-98 (1981) (quoting *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, 522, 57 S.Ct. 868, 878-79, 81 L.Ed. 1245, 1261 (1937)). Seminole Electric enjoys these benefits and must, as all others, pay its fair share. The final prong of the test is thus satisfied.

CROSS-APPEAL

Upon determining section 212.059(5) to be unconstitutional, the trial court held that the Department of Revenue should have assessed a tax of $76,081.37, based on the miles traveled in Florida. The court then ordered a refund of the tax paid less that amount. On cross-appeal, Seminole Electric contends that the trial court had no authority to, in effect, rewrite the statute and that a full refund was required. Our decision renders this issue moot, and we do not, therefore, address it on the merits.

Reversed.

DANAHY, A.C.J., and FRANK, J., concur.

APPENDIX B

Case No. 90-17722

SEMINOLE ELECTRIC COOPERATIVE, INC.,
v.
THE FLORIDA DEPARTMENT OF REVENUE, et al.

Thirteenth Judicial Circuit, Hillsborough County
March 22, 1991

OPINION OF THE COURT

GUY W. SPICOLA, Circuit Judge.

FINAL DECLARATORY JUDGMENT

THIS CAUSE came before the Court on Plaintiff's Motion for Summary Judgment heard on January 30, 1991 and February 13, 1991. The Court, having considered the parties' memoranda of law and oral argument, and having conducted its own research, hereby makes the following declaratory judgment.

FACTS

Seminole Electric operates two coal-fired electric generating plants near Palatka, Florida. Coal used to operate the plants is purchased from mines located in Illinois and Kentucky. All shipments of coal originated in either Illinois or Kentucky and terminated in Florida. Pursuant to transportation contracts between Seminole Electric and third-party coal transportation companies, coal is transported by barges down the Ohio and Mississippi Rivers to the Gulf of Mexico and through the intracoastal waterway to Port St. Joe, Florida.

The total marine mileage for coal transport is 1,346 miles. The total Florida mileage is 167 miles. The Florida portion of the total mileage is 12.40713%. Beginning July 1, 1987, the State of Florida, through its Department of Revenue, imposed a service sales tax ("tax") on interstate transportation services pursuant to Florida Statutes § 212.059 (1987). In accordance with the statute, a tax of 5% was assessed on interstate transportation services and computed on one-half of the service price for coal transportation charged to Seminole Electric under contracts with coal transportation companies.

From July 1987 through December 1987, Seminole Electric paid $12,264,137.20 in coal transportation charges. Of that total amount of services, 50% or $6,132,068.60 was subject to the tax pursuant to the statute. The total tax paid by Seminole Electric for the six-month period the tax was imposed by the Department of Revenue was $306,603.43. The following table sets forth a mileage comparison and the computation of the service tax involved in this case.

SERVICE TAX ON WATER TRANSPORTATION SERVICES JULY THROUGH DECEMBER 1987

Total Florida Mileage	167		
Total Interstate Mileage	1,346		
Florida portion	*12.40713%*		
Total Transportation Charges—July through December, 1987	(1) 50% of charges	(2) 12.40713% of charges	Difference (1) - (2)
$112,264,137.20	6,132,068.60	1,521,627.45	4,610,441.15
Service Tax Rate	*x 5%*	*x 5%*	*x 5%*
SERVICE TAX	$306,603.43	$76,081.37	$230,522.06

Rate of Tax on Florida Transportation Services in this case.

Transportation Services allocated to Florida mileage	1,521,627.45
Service Tax Assessed and paid	306,603.43

	306,603.43
Service Tax divided by transportation services	1,521,627.45
Effective Rate of Tax (approximately)	20%

Seminole Electric seeks a refund of the taxes paid arguing that Florida State § 212.059(5) (1987) violates the Commerce Clause of Article I, Section 8 of the United States Constitution. This court has jurisdiction pursuant to Florida Statutes § 72.011.

DISCUSSION

The issue before the court is whether Florida Statutes § 212.059(5) (1987) violates the Commerce Clause of the United States Constitution. In 1987, the Florida Legislature imposed a sales tax on interstate transportation services by amending Chapter 212 of the Florida Statutes. The amended statute provided:

> 212.059 Sales and use tax on services.—It is hereby declared to be the legislative intent to levy an excise tax on the sale of services in this state as hereinafter provided. It is further declared to be the legislative intent to levy a complementary excise tax on the use of services in this state as hereinafter provided.
>
> (I)(a) A tax is hereby imposed on the sale at retail of any service in this state at the rate of 5 percent of the sales price of the service. The tax shall be computed on each taxable sale of a service for the purpose of remitting the amount of tax due the state, and shall include each and every retail sale of a service.
>
> . . . . . .
>
> (5) Notwithstanding other provisions of this section to the contrary:
>
> (a) Interstate and international transportation services shall be considered sold or used in this state to

the extent that the sale price or cost price of the service is apportioned to this state pursuant to paragraph (b).

(b) The sales price of the sale of interstate or international transportation services, or the cost price of the use of interstate or international transportation services, shall be apportioned to the state as provided in this paragraph. There shall be included in the measure of the tax imposed by this part on the sale or use of interstate or international transportation service *one-half of the sales price or cost price of the Florida service provider if the point of origin of the transportation service is in Florida, and one-half of said price if the point of termination is in Florida* for the service transaction in question. For the purposes of this paragraph:

1. "Florida service provider" means the person providing transportation services in Florida regardless of the commercial domicile of such person; and

2. "Point of origin" and "point of termination" mean the physical locations at which the Florida service provider begins or ends movement of the property which is being transported, respectively.

(emphasis supplied)

The United States Supreme Court has established a four-pronged test to determine whether a state tax violates the Commerce Clause. A tax statute will be sustained against a Commerce Clause challenge if the tax 1) is applied to an activity with a substantial nexus to the taxing state, 2) is fairly apportioned, 3) does not discriminate against interstate commerce, and 4) is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). The court must determine whether Florida Statutes § 212.059(5) satisfies the *Complete Auto Transit* test.

1. SUBSTANTIAL NEXUS

Both parties agree that there is a substantial nexus with the State of Florida for the state to tax the transportation services for which Seminole Electric contracted for the transportation of coal from Kentucky to its electric generation plants in Florida. The parties disagree, however, on the application of the remaining three prongs of the *Complete Auto Transit* test.

2. FAIR APPORTIONMENT

The second prong of the *Complete Auto Transit* test requires that the service tax be fairly apportioned to Florida services. The central purpose behind the apportionment requirement is to ensure that each state taxes only its fair share of an interstate transaction. *Goldberg v Sweet*, 488 U.S. 252, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989). A tax is fairly apportioned under the second prong of the *Complete Auto Transit* test when the tax is found to be both internally and externally consistent. Id. at 261, 109 S.Ct. at 588, 102 L.Ed.2d at 616; *Container Corp. of America v Franchise Tax Bd.*, 463 U.S. 159, 169, 103 S.Ct. 2933, 2942, 77 L.Ed.2d 545, 556 (1983).

To be internally consistent, a tax must be structured so that if every state were to impose an identical tax, no multiple taxation would result. *Goldberg*, 488 U.S. at 261, 109 S.Ct. at 589, 102 L.Ed.2d at 617; *Container Corp.*, 463 U.S. at 169, 103 S.Ct. at 1942, 77 L.Ed.2d at 556. Seminole Electric admits that the statute passes the internally consistent test because there is no possibility of multiple taxation. Multiple taxation is impossible in this case since the tax is assessed by the state that is either the point of origin or the point of termination of the interstate transportation service. The tax is then only imposed on one-half of the cost of the transportation service. Thus, only two states can assess the tax and each can only impose the tax on half of the transportation service cost. Even if Seminole Electric paid a point of origin tax

to Kentucky where the coal barges began their route to the power plant, and then paid a point of termination tax to Florida, there would be no multiple taxation since each state is only imposing a tax on one-half of the total transportation cost.

The Department of Revenue points out that any possibility of multiple taxation is cured by the credit provision of Florida Statutes § 212.06(7). The Defendants argue that Florida's tax is fairly apportioned since a credit is allowed for taxes paid to other states. While a credit provision will render an otherwise unfairly apportioned taxing scheme fairly apportioned, *D. H. Holes Co., Ltd. v McNamara*, 486 U.S. 24, 108 S.Ct. 1619, 100 L.Ed.2d 21 (1988), such provision is inapplicable in the present case. There is no possibility of multiple taxation under Florida Statutes § 212.059(5) since only two states may tax the interstate coal transportation services and each state taxes a separate event. As Seminole Electric correctly notes, where there is no possibility of multiple taxation, whether or not there is a credit available never comes into play.

Notwithstanding the statute's passing the internal consistency test, a tax is fairly apportioned only if it passes both the internal consistency test and the external consistency test. The "second and more difficult" component of fairness in an apportionment formula is external consistency. *Container Corp.*, 463 U.S. at 169, 103 S.Ct. at 2942, 77 L.Ed.2d at 556. The external consistency test asks whether the State of Florida has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed. *Goldberg*, 488 U.S. at 262, 109 S.Ct. at 589, 102 L.Ed.2d at 617. An apportionment formula will be struck down if the taxpayer can prove "by clear and cogent evidence that the income attributed to the State is in fact out of all appropriate proportions to the business transacted in that State." *Container Corp.*, 463 U.S. at 170, 103 S.Ct. at 2942, 77 L.Ed.2d at 556.

Seminole Electric argues that Florida Statutes § 212.059(5) fails the external consistency test because Florida taxes more than the actual number of miles of transportation services that occur within the state. They argue that assessing tax on one-half of the total value of the interstate transportation services, regardless of the number of miles, does not reasonably reflect the in-state component of the activity being taxed. The court agrees.

In *Central Greyhound Lines, Inc. v Mealey*, 334 U.S. 653, 68 S. Ct. 1260, 92 L.Ed. 1633 (1948), the State of New York attempted to tax the gross receipts of a bus transportation company when almost 43% of the mileage for the bus routes subject to tax were within New Jersey and Pennsylvania. The Supreme Court held that the tax violated the Commerce Clause because it was not fairly apportioned to the business done within the State of New York. The court stated:

> [E]ven if neither Pennsylvania nor New Jersey sought to tax their proportionate share of the revenue from this transportation, such abstention would not justify the taxing by New York of the entire revenue. [citation]. By its very nature an unapportioned gross receipts tax makes interstate transportation bear more than "a fair share of the cost of the local government whose protection it enjoys." [citation]. *Id.* at 663, 68 S.Ct. at 1266, 92 L.Ed. at 1642.

Similarly, in the present case, Florida is attempting to tax one-half of the total cost of interstate transportation services when more than 87% of the total miles were traveled outside of Florida. It is clear that the Florida tax makes Seminole Electric bear more than its "fair share." Accordingly, the court finds that Florida Statutes § 212.059(5) is not fairly apportioned since it fails to take into account the in-state mileage of the coal barge.

The Defendants argue that use taxes need not be apportioned based upon a proportionate share of the activity

underlying the sale. They rely on *Goldberg v Sweet* for the proposition that apportionment based on mileage is not necessary when such a formula would pose administrative burdens. In *Goldberg*, the Supreme Court ruled that an Illinois tax on interstate telecommunications did not violate the Commerce Clause since it satisfied all four prongs of the *Complete Auto Transit* test. The Illinois statute imposed a 5% tax on the gross charges of interstate telecommunications which originated or terminated in Illinois and which were charged to an Illinois service address. In analyzing the fair apportionment question, the Court stated that:

> In previous cases we have endorsed apportionment formulas based upon the number of miles a bus, train, or truck traveled within the taxing State. But those cases all dealt with the movement of large physical objects over identifiable routes, where it was practicable to keep track of the distance actually traveled within the taxing State. [citation]. This case, by contrast, involves the more intangible movement of electronic impulses through computerized networks. An apportionment formula based on mileage or some other geographic division of individual telephone calls would produce insurmountable administrative and technological barriers. [citation]. We thus find it significant that Illinois' method of taxation is a realistic legislative solution to the technology of the present-day telecommunications industry. 488 U.S. at 264, 109 S.Ct. at 590, 102 L.Ed.2d at 619.

The Defendants' reliance on *Goldberg* is misplaced. Whereas *Goldberg* involved the "intangible movement of electronic impulses," the present case deals with coal barges travelling down the Ohio and Mississippi Rivers. The present case is clearly one which deals with "the movement of large physical objects over identifiable routes." *Goldberg* allowed a non-mileage apportionment

formula because a mileage apportionment formula would have produced insurmountable administrative and technological barriers. In the present case, the Defendants have not shown any insurmountable administrative or technological barriers that would prevent the State of Florida from apportioning its interstate transportation service tax on the actual mileage within the State of Florida. As Seminole Electric points out, the Department of Revenue's auditor accepted the United States Coast Guard guide for waterway mileage along with a shipping company map in determining the number of miles the coal was transported in Florida waters. This shows that information was readily available concerning the actual mileage travelled in Florida; thus, there was no real administrative burden to the Department of Revenue.

Furthermore, Florida has other provisions in the sales tax law which allocates taxes based on intrastate mileage. *See e.g.* Florida Statutes § 212.08(4)(a)(2); § 212.08(8)(a); § 212.08(9)(a). Since these provisions require the allocation of the respective taxes based on the apportionment of intrastate mileage, it is clear that there is no administrative burden on the Department of Revenue which would prevent it from apportioning the interstate transportation service tax on the actual mileage within the State of Florida.

3. DISCRIMINATION AGAINST INTERSTATE COMMERCE

The third prong of the *Complete Auto Transit* test requires that the service tax not discriminate against interstate commerce. The third prong of the *Complete Auto Transit* test is closely related to the second prong. *See e.g. Container Corp.*, 463 U.S. at 171, 103 S.Ct. at 1943, 77 L.Ed.2d at 557 ("the anti-discrimination principle has not in practice required much in addition to the requirement of fair apportionment."); *Armco, Inc. v Hardesty*, 467 U.S. 638, 644, 104 S.Ct. 2620,—, 81 L.Ed.2d 540, 547

("A tax that unfairly apportions income from other States is a form of discrimination against interstate commerce.").

Seminole Electric has demonstrated to the court how Florida's unapportioned service tax on interstate transportation services discriminates against interstate commerce. The table found on page three shows that the service tax assessed ($306,603.43) on the value of transportation services actually provided in Florida waters ($1,521,627.45) represents an effective rate of more than 20% on those Florida-related services. This rate of tax is more than four times the 5% tax Florida assessed on intrastate transportation services.

Seminole Electric relies on *American Trucking Associations, Inc. v Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987), to show the discriminatory impact of state taxes on interstate commerce. In *Scheiner*, Pennsylvania assessed a flat axle tax on all trucks using Pennsylvania highways and also granted Pennsylvania vehicles a reduction in registration fees which effectively offset the axle tax for state-registered vehicles. Appellants argued that the taxes were discriminatory because they imposed a much heavier charge per mile of highway usage on out-of-state vehicles. The cost per mile of the flat taxes was about five times higher for out-of-state vehicles than for local vehicles since the Pennsylvania-based vehicles traveled about five times as many miles on Pennsylvania roads as did the out-of-state vehicles. The Court ruled that: "In practical effect, since they impose a cost per mile on appellants' trucks that is approximately five times as heavy as the cost per mile borne by local trucks, the taxes are plainly discriminatory." *Id.* at 286, 107 S.Ct. at 2841, 97 L.Ed.2d at 244.

Seminole Electric argues that, as with the flat tax in *Scheiner*, the service tax it paid to the Department of Revenue imposed a much heavier charge per mile for transportation services involving interstate transportation

compared to the tax assessed against in-state transportation services. The Defendants discount *Scheiner* because it involved "flat" taxes, which the present case does not.

The Defendants rely on *Commonwealth Edison Co. v Montana*, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981). In *Commonwealth Edison*, Montana imposed a severance tax on coal at the same rate regardless of whether the final destination of the coal was local or interstate. The taxpayer claimed discrimination based on the fact that 90% of the Montana coal was shipped to other states. The Court rejected the taxpayer's claim and held that "there is no real discrimination in this case; the tax burden is borne according to the amount of coal consumed and not according to any distinction between in-state and out-of-state consumers." *Id.* at 619, 101 S.Ct. at 2954, 69 L.Ed.2d at 895.

The Defendants analogize *Commonwealth Edison* to the present case. They argue that since the service tax is a percentage of the value of the interstate transportation service, the tax burden is borne according to value of the transportation service and not according to any distinction between in-state and out-of-state consumers. This argument fails to realize that what is being taxed in *Commonwealth Edison* is *Montana* coal whereas what is being taxed in the present case is interstate transportation services. While there may be no distinction made between the use of coal for interstate and intrastate purposes in *Commonwealth Edison*, there is a distinction made between the number of miles traveled outside Florida and the number of miles traveled inside Florida in the present case. In the present case, as the percentage of out-of-state mileage increases, the effective rate of tax on a particular transportation service also increases.

While the service tax in the present case is not a strict flat tax like that in *Scheiner*, neither is it a severance tax like that in *Commonwealth Edison*. Notwithstanding the

difference between a service tax and a flat tax, and contrary to Defendant's assertion, Florida's method of measuring the tax on interstate transportation services is more akin to that found impermissible in *Scheiner*, than that found permissible in *Commonwealth Edison*. Therefore, the court finds that Florida Statute § 212.059(5) impermissibly discriminates against interstate commerce and thus fails the third prong of the *Complete Auto Transit* test.

4. FAIR RELATIONSHIP TO THE BENEFITS PROVIDED BY FLORIDA

The fourth prong of the *Complete Auto Transit* test is closely related to the first prong. Under the first prong, the interstate business must have a substantial nexus with Florida before *any* tax may be levied on it. Beyond that threshold requirement, the fourth prong imposes the additional requirement that the measure of the tax be reasonably related to the extent of the taxpayer's presence within the state. *Commonwealth Edison*, at 626, 101 S.Ct. at 2958, 69 L.Ed.2d at 900; *Delta Air Lines, Inc. v Department of Revenue*, 455 So.2d 317, 323 (Fla. 1984).

In *Commonwealth Edison*, the Court found the Montana tax to be in proper proportion to the taxpayer's presence within the state since the tax was measured as a percentage of the value of the coal taken. Only when the measure of a tax bears no relationship to the taxpayer's presence or activities in a state may a court properly conclude under the fourth prong of the *Complete Auto Transit* test that the state is imposing an undue burden on interstate commerce. 453 U.S. at 629, 101 S.Ct. 2959, 69 L.Ed.2d at 902.

The United States Supreme Court applied these concepts to the flat tax charged by Pennsylvania and held the tax to be an unconstitutional burden on interstate commerce. *Scheiner*, 483 U.S. at 291, 107 S.Ct. at 2844, 97 L.Ed.2d at 247. The Court held such flat taxes unconstitutional because they did not vary directly with the miles

traveled within the state. Similarly, the amount of Florida's service tax owed by Seminole Electric does not vary directly with the miles traveled within Florida since the tax is based on an arbitrary one-half of the services performed rather than on the number of miles traveled in Florida. Therefore, Florida Statutes § 212.059(5) fails the fourth prong of the *Complete Auto Transit* test.

Having determined that Florida Statutes § 212.059(5) unconstitutionally violates the Commerce Clause, the next issue before the court becomes what effect the unconstitutional statute has on the taxpayer's obligation to pay its taxes. Florida Statutes § 212.0591(2) (1987) states that:

> If the sales price of the sale of a service or if the cost price of the use of a service cannot be included within the measure of the tax imposed by this part under the Constitution or laws of the United States, there shall be included in the measure of the tax imposed by this part on the sale of services that proportion of the sales price, or on the use of services that proportion of the cost price, that may lawfully be included under the laws and Constitution of the United States.

The Department of Revenue argues that section 212.0591(2) allows it to include in the measure of the tax the Florida portion of the interstate transportation service. In other words, the Department of Revenue should be allowed to assess $76,081.37 in taxes against Seminole Electric since that amount equals 5% of the Florida portion of the total transportation charges. (See Table on page three). The court agrees.

There is no dispute that the Florida Legislature had the authority to tax interstate transportation services since the appropriate nexus existed. Seminole Electric admits that there is a substantial nexus with the State of Florida for the Department of Revenue to tax the transportation services for the shipping of coal from Kentucky and Illinois

to Florida. Seminole Electric further admits that it would be required to pay the service tax if it was fairly apportioned to the actual mileage traveled within Florida.

The United States Supreme Court noted in *Central Greyhound* that where a statute unconstitutionally levies an unapportioned gross receipts tax on a transaction, "the entire tax need not fall." 334 U.S. at 663, 68 S.Ct. at 1266, 92 L.Ed. at—. The Court stated: "There is no dispute as to feasibility in apportioning this tax. On the record before us the tax may constitutionally be sustained on the receipts from the transportation apportioned as to the mileage within the State." *Id.*

Similarly, in the present case, there is no dispute about the feasibility of apportioning the tax on transportation services. Seminole Electric provided, and the Department of Revenue accepted, the United States Coast Guard guide for interstate waterway mileage along with a shipping map for determining the number of miles the coal was transported in Florida waters and the number of miles the coal was transported in other states' waters.

Furthermore, Florida Statutes § 212.0591(2) provides that if the sales price of a service cannot lawfully be included within the measure of tax imposed, then there shall be included that proportion of the sales price that may lawfully be included. In the present case, the sales price of interstate transportation services cannot lawfully be included within the measure of the tax because the tax violates the Commerce Clause. Therefore, there shall be included within the measure of the tax imposed, Florida's portion of the interstate transportation service. It is undisputed that Florida's portion of the interstate transportation service may lawfully be included within the measure of the tax imposed. The statutory language of section 212.0591(2) makes it clear that as between the imposition of the tax, including in its measure only that which is constitutionally permissible, or the granting of Seminole

Electric an exemption from all tax, the imposition of the tax should prevail. *See e.g. Department of Revenue v Magazine Publishers of America, Inc.*, 565 So.2d 1304, 1310 (Fla. 1990) (legislative intent statute "makes it unmistakably clear that as between the imposition of the tax or the granting of an exemption, the tax shall prevail.").

Seminole Electric cites *Barndollar v Sunset Realty Corp.*, 379 So.2d 1278 (Fla. 1979), for the proposition that in order to sever an invalid provision of a statute, the court must be able to conclude that the Legislature would have been content to enact the law without the invalid provision. Seminole Electric argues that the legislative history of section 212.059(5) shows that the Legislature would not have adopted the statute without the unconstitutional assessment of the service tax. In Chapter 87-6, Laws of Florida (1987), the Florida Legislature sought to apportion the interstate transportation service tax based on the proportion of in-state miles to out-of-state miles. However, the Legislature revised Chapter 87-6 in Chapter 87-101 and altered the language of section 212.059(5) so that the tax was measured on one-half of the total cost of the transportation service, regardless of the number of miles traveled within Florida.

Seminole Electric argues that the Legislature sought to adopt an unconstitutional tax and would not have adopted a constitutional tax when it finally passed Florida Statutes § 212.059(5). Despite Plaintiff's contentions, the court finds that the Florida Legislature did not intend to pass an unconstitutional law when it finally promulgated Florida Statutes § 212.059(5). Had the Legislature known that Florida Statutes § 212.059(5) would be declared unconstitutional, it would not have passed it. For whatever reasons, the Legislature decided to pass a tax statute affecting interstate commerce without apportioning the tax based on Florida mileage. Since the purpose of a tax statute is to raise money, it is clear that the Legislature would have preferred to pass section 212.059(5) with the constitution-

ally-approved apportionment formula than to have no statute in effect at all. To rule otherwise would render the remedy provision of section 212.0591(2) absolutely meaningless.

Therefore, pursuant to Florida Statutes § 212.0591(2) (1987), the court finds that the Department of Revenue should have assessed the interstate transportation service tax of 5% on that portion of the sales price which reflects the miles traveled in Florida. Five percent of the portion of the sales price ($1,521,627.45) which reflects the miles traveled in Florida equals $76,081.37. Since Seminole Electric paid $306,603.43 to the Department of Revenue, it is entitled to a refund of $230,522.06 (($306,603.43—$76,081.37).

Finally, Seminole Electric is entitled to post-judgment interest at a rate of 12% a year pursuant to Florida Statutes § 55.03(1). Neither this statute nor other applicable statutes exempt the Department of Revenue from the obligation to pay interest on judgments rendered against it. *See Roberts v Askew*, 260 So.2d 492 (Fla. 1972).

CONCLUSION

Based on the preceding discussion of the law, the court finds that Florida Statutes § 212.059(5) (1987), as applied in this case, violates the Commerce Clause of Article I, Section 8 of the United States Constitution. The court further finds that pursuant to Florida Statutes § 212.0591(2) (1987), Seminole Electric is assessed a tax whose measure is imposed on the Florida portion of the interstate transportation service. It is therefore *ORDERED AND ADJUDGED* that Seminole Electric be entitled to a refund of $230,522.06, plus post-judgment interest of 12%.

DONE AND ORDERED in Tampa, Hillsborough County, Florida this 22nd day of March, 1991.

APPENDIX C

SUPREME COURT OF FLORIDA

CASE NO. 80,005

THURSDAY, SEPTEMBER 17, 1992
SEMINOLE ELECTRIC COOPERATIVE, INC., ETC.
Petitioner,

v.

DEPARTMENT OF REVENUE, ET AL.,
Respondents.

DISTRICT COURT OF APPEAL,
2ND DISTRICT NO. 91-01145

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, MCDONALD, SHAW, KOGAN and HARDING, JJ., concur

A True Copy
TEST: [SEAL]
Sid J. White
Clerk, Supreme Court

BH
cc: Hon. William A. Haddad, Clerk
Hon. Richard L. Ake, Clerk
Hon. Guy W. Spicola, Judge
Wallace B. Anderson, Jr., Esquire
Robert A. Mora, Esquire
Kevin J. O'Donnell. Esquire

APPENDIX D

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

Case No. 91-01145

MAY 13, 1992

STATE OF FLORIDA, DEPT. OF REVENUE, etc., et al.,
Appellant(s),

v.

SEMINOLE ELECTRIC COOPERATIVE, INC., etc.,
Appellee(s)

BY ORDER OF THE COURT:

Counsel for appellee having filed a motion for rehearing in the above-styled case, upon consideration, it is

ORDERED that said motion is hereby denied.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER

/s/ William A. Haddad
WILLIAM A. HADDAD, CLERK

c: Kevin J. ODonnell, Esq.
Robert A. Mora, Esq.
Wallace B. Anderson, Jr., Esq.
Richard L. Ake, Clerk

/PM

Supreme Court, U.S.
FILED
JAN 13 1993
OFFICE OF THE CLERK

No. 92-1034

In The
Supreme Court of the United States
October Term, 1992

SEMINOLE ELECTRIC COOPERATIVE, INC.,
Petitioner,

vs.

FLORIDA DEPARTMENT OF REVENUE and
GERALD R. LEWIS,
as Comptroller of the State of Florida,
Respondents.

On Petition for Writ of Certiorari
To The District Court of Appeal of Florida
Second District

BRIEF IN OPPOSITION FOR RESPONDENTS

ROBERT A. BUTTERWORTH
Attorney General

KEVIN J. ODONNELL*
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
Tax Section, The Capitol
Tallahassee, FL 32399-1050
(904) 487-2142

*Counsel of Record

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT 1

ARGUMENT 4

I. THE DECISIONS BELOW ARE NOT INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT 5

II. THE CASE DOES NOT WARRANT REVIEW AS PRESENTING NOVEL QUESTIONS IN A DEVELOPING SPHERE OF STATE TAXATION 8

CONCLUSION 9

TABLE OF AUTHORITIES

Cases *Page*

American Trucking Associations, Inc. v. Scheiner, 483 U.S. 266 (1987) 3, 7, 8

Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653 (1948) 3, 6

Commonwealth Edison Co. v. Montana, 453 U.S. 609, 623 (1981) 4, 5, 8

Complete Auto Transit Inc. v. Brady, 430 U.S. 274 (1977) 2, 4, 5, 8

Container Corporation of America v. Franchise Tax Board, 463 U.S. 159 (1983) 6, 7

D.H. Holmes Co. Ltd. v. McNamara, 486 U.S. 24 (1988) 5, 7, 8

Goldberg v. Sweet, 488 U.S. 252 (1989) 3, 5, 6, 8

McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 58 (1940) 5

Wardair Canada Inc. v. Florida Department of Revenue, 477 U.S. 1 (1986) 5

Statutes

Fla. Stat. § 212.059(2) (1987) 2

Fla. Stat. § 212.059 (1987) 3

In The

Supreme Court of the United States

October Term, 1992

No. 92-1034

SEMINOLE ELECTRIC COOPERATIVE, INC.,
Petitioner,

vs.

FLORIDA DEPARTMENT OF REVENUE and
GERALD R. LEWIS,
as Comptroller of the State of Florida,
Respondents.

On Petition for Writ of Certiorari
To The District Court of Appeal of Florida
Second District

BRIEF IN OPPOSITION FOR RESPONDENTS

STATEMENT

The case involves the constitutionality of a Florida sales tax — repealed effective January 1, 1988 — as it was imposed on a Florida purchaser of interstate transportation services. A Florida trial court found the tax unconstitutional. Petitioner then opposed Respondent's motion to have that decision certified for direct review by the Florida Supreme Court, arguing that the case was not one of great importance. Sem. Elec. Pet. 23 n.12. Florida's Second District Court of Appeal reversed, upholding the tax against the Commerce Clause challenge; it also refused rehearing and the Florida Supreme Court declined to review.

Between July and December 1987 a tax of five percent of the cost price was assessed on interstate transportation services with a point of origin or termination in Florida. Fla. Stat. § 212.059(2) (1987). Petitioner operated two coal fired electric generating plants in Florida. During that time, it hired companies to transport coal from Illinois and Kentucky to Florida. Petitioner paid tax on one-half of the cost price of those coal transportation services terminating in Florida. Afterwards, it sought a refund.

The sole issue below was whether the tax passed muster under the Commerce Clause. Petitioner conceded at trial and on appeal that the first part of the test announced in *Complete Auto Transit Inc. v. Brady,* 430 U.S. 274 (1977), had been met. Florida had a substantial nexus to the activity being taxed. Sem. Elec. Pet. App. 3a, 12a. Petitioner also admitted that the tax was internally consistent and there was no possibility of multiple taxation. *Id.*[1]

The trial court found that no other state could tax the "separate event" made subject to Florida tax:

> Multiple taxation is impossible in this case since the tax is assessed by the state that is either the point of origin or the point of termination of the interstate transportation service. The tax is then only imposed on one-half of the cost of the transportation service. Thus, only two states can assess the tax and each can only impose the tax on half the transportation service cost.

* * *

---

1 For the first time the Petitioner now contends that a risk of multiple taxation is present. Sem. Elec. Pet. 22. However, the record shows that the Petitioner admitted below that no risk of multiple taxation existed. The newfound argument should not form the basis for a decision to review the judgment below if the Court intends to confine review to the record and case made therein.

> There is no possibility of multiple taxation under Florida Statutes § 212.059(5) since only two states may tax the interstate coal transportation services and each state taxes ***a separate event.***

Id. at 12a-13a.

Nevertheless, the trial court ruled that the method of apportionment was unfair and struck the tax. It also ruled that the tax discriminated against interstate commerce and was not fairly related to the benefits provided by Florida. The trial court's opinion principally relied on *Goldberg v. Sweet,* 488 U.S. 252 (1989), *Central Greyhound Lines, Inc. v. Mealey,* 334 U.S. 653 (1948) and *American Trucking Associations, Inc. v. Scheiner,* 483 U.S. 266 (1987). The ruling was premised on the finding that mileage apportionment was feasible and that Florida taxed "more than the actual number of miles of transportation services that occur within the state." *Id.* at 14a.

Describing the tax imposed by Fla. Stat. § 212.059 (1987), Florida's Second District Court of Appeal found it to be a general tax on the sale or use of services performed, consumed or enjoyed within Florida. Sem. Elec. Pet. App. 2a-3a. A sale occurred when more than fifty percent of the service was performed within Florida. A use tax was imposed on the privilege of consuming a service, the benefit of which was enjoyed in Florida. *Id.* The tax "is not a tax on transportation per se. Neither is it a tax on the use of coal. It is a tax on the use of a transportation service." *Id.* at 4a. The sales and use tax was not computed based upon mileage; rather, it was determined for each transaction based upon the value of the service rendered. *Id.*

The Second District ruled that the tax was fairly apportioned. *Id.* at 5a. Applying *Goldberg,* the court noted that the Constitution does not specify a particular apportionment formula. Petitioner, it determined, derived "a direct and

substantial economic benefit" properly taxable where it was enjoyed. *Id.* at 4a. The Second District found apportionment between the two States with nexus, measurement by the value of each transaction and collection from the ultimate consumer. *Id.* at 5a. Credit was also noted as available for tax paid to other States. *Id.* at 3a.

The Second District also found that the tax did not discriminate. *Id.* at 6a. Having outlined the incidence of the tax and noted admissions on issues of nexus and risk of multiple taxation, it found the same tax burden on interstate transportation terminating and originating in Florida; no special preferences for Floridians engaged in interstate commerce; imposition on the full sales price when both point of origin and termination were in Florida, but on only one-half the sales price when just the point of origin or termination was in Florida; and a full credit for tax paid elsewhere on the same sale or use. *Id.* The Second District also held that the measure of the general revenue tax was fairly related to the benefit of services derived from Florida by the Petitioner, relying on *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 623 (1981). *Id.* at 7a.

ARGUMENT

Petitioner has shown no reason for review. The Second District applied establish law to the case presented. The importance of any federal question presented and the constitutional significance of any resultant decision is minimal given the force of Petitioner's admissions. Although Petitioner asserts that the Florida District Court disregarded governing constitutional principles, that court, in fact, applied *Complete Auto Transit* and its progeny in a wholly conventional manner based upon the facts and the case presented.

I. THE DECISIONS BELOW ARE NOT INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

The Second District considered practical economic consequences. The tax at issue had the characteristics of a sales tax. Any potential difference ascribed to this tax from others long upheld by this Court was negated in the record below. The Second District's constitutional analysis mirrored that adopted by this Court in comparable circumstances. Nothing in the Petition indicates a need for clarification in this area of the law, especially when the controversy is premised upon the commercial impact of a statute which was repealed some six years ago.

The decision below is entirely consistent with the constitutional standards set forth by this Court. The States have considerable latitude in imposing general revenue measures. *Commonwealth Edison Company,* 453 U.S. at 622. Even prior to the Court's opinion in *Complete Auto Transit,* the Court had long upheld, against Commerce Clause challenges, sales and use taxes measured by gross charges. *E.g., McGoldrick v. Berwind-White Coal Mining Co.,* 309 U.S. 33, 58 (1940). The *Complete Auto Transit* Court itself upheld a sales tax imposed on gross income derived from transportation, albeit between points within the State, proceeding on the assumption that the activity subject to tax was interstate commerce. 430 U.S. 276 n. 2. Applying the test in *D.H. Holmes Co. Ltd. v. McNamara,* 486 U.S. 24 (1988), the Court held that Louisiana's use tax was fairly apportioned since it provided a credit against use tax for sales taxes that had been paid to other States. *See also Wardair Canada Inc. v. Florida Department of Revenue,* 477 U.S. 1 (1986). Applying the test in *Goldberg,* the Court upheld a tax assessed on the gross charge for interstate telephone calls because the tax was fairly apportioned. The Second District thus broke no new ground in concluding that the Florida Legislature had

arrived at a permissible method of apportionment. Here, that court merely applied the accepted standards previously announced by this Court and rendered a decision which is plainly correct and does not merit further review.

1. The Petitioner incorrectly asserts that *Goldberg* announced a narrow "exception" to a requirement that mileage apportionment be used whenever it is feasible. *See* Sem. Elec. Pet. 15-18. Petitioner would essentially gut *Goldberg's* continued vitality by limiting the application of the Court's reasoning to cases involving long distance telephone calls. Certainly, this Court has "endorsed" apportionment formulas based upon mileage. *Goldberg,* 488 U.S. at 264-265. As a practical matter, apportionment formulae based upon mileage afford one method by which a State may avoid the risk of multiple taxation where many States might claim nexus. However, prior endorsement is not the constitutional test. And the Court has "declined to undertake the essentially legislative task of establishing a 'single constitutionally mandated method of taxation.'" 488 U.S. at 261 *(quoting Container Corporation of America v. Franchise Tax Board,* 463 U.S. 159 (1983)). *Goldberg* leaves the States free to consider and to enact methods of taxation which afford "realistic legislative solution[s]" so long as, in their practical effect, they are not inconsistent with the goals underlying the Commerce Clause. The Second District's analysis simply applied this Court's opinions to the facts peculiar to this case and concluded, correctly, that the Florida Legislature's chosen method had not been shown unfair.

The potential vice in an excise tax measured by gross receipts is the risk of multiple taxation. Petitioner would, incorrectly, find support for mandating mileage apportionment from a decision made in a case where the risk was present, *Central Greyhound Lines, Inc.,* 334 U.S. at 660, and the State imposed tax on the entire gross receipts of a bus company with routes passing through other States. Here,

however, the Florida District Court noted that "the use tax is apportioned between the two states with nexus, the state of origin and the state of termination." Sem. Elec. Pet. 5a. And it properly concluded that the State's method of apportionment satisfied the external consistency test and was fair. Given the record, the decision below was amply justified on this point.

2. The test for discrimination does not, in practice, require much more than a showing of fair apportionment. *Container Corporation of America,* 463 U.S. at 171. Florida did not impose a flat-tax at a uniform rate on the privilege of providing transportation services, no matter the extent to which those privileges were enjoyed, as was found discriminatory in *Scheiner,* 483 U.S. 266. *Scheiner* did not consider, and obviously did not decide, the issue presented by the claim of discrimination advanced here: whether a State's apportionment formula must measure value by a method which allocates a portion of the value to other States which, concededly, poses no risk to tax that value. Petitioner's demand for mileage apportionment is simply an argument for partial immunity and was properly rejected. Allocating mileage to States which are admittedly of no threat to impose tax is not constitutionally required.

Petitioner's "effective rate" of tax calculation — Sem. Elec. Pet. 11 — eliminates that part of cost which could be attributed, based upon mileage, to that portion of the service physically performed outside the State. However, Florida taxed this Floridian's use of the service in Florida. But, more importantly, Petitioner cannot justify attributing part of the measure of the tax to States which cannot tax the transaction. The Florida tax structure, like the Louisiana tax structure examined in *D.H. Holmes,* does not discriminate against interstate commerce. Given trips of equal mileage, assuming equal cost, tax is applied at the same rate whether the trip is wholly instate or interstate.

3. Petitioner's argument most clearly falls apart in its analysis of the fourth prong of the *Complete Auto Transit* test — whether the tax is fairly related to the services provided to the taxpayer by the State. The fourth test, closely related to the first, asks the simple question: has the State given anything for which it can ask a return? *Commonwealth Edison Company,* 453 U.S. at 626. Petitioner argues that the analysis of the fourth prong described in *D.H. Holmes* and reaffirmed in *Goldberg* is "the simple test...." Sem. Elec. Pet. 21-22. Petitioner concedes that the Florida trial court did not use the test described in those two cases. Rather, the trial court based its ruling upon its application of *Scheiner. Id.* Petitioner also concedes that the taxpayer in Scheiner was subject to multiple taxation, whereas the taxpayer in *D.H. Holmes* was not. *Id.* at 22. However, Petitioner neglects to note that, unlike the taxpayer in *Scheiner,* it long ago conceded that it was not subject to multiple taxation. Thus, Petitioner's argument on this point is not based upon the record of this case.

II. THE CASE DOES NOT WARRANT REVIEW AS PRESENTING NOVEL QUESTIONS IN A DEVELOPING SPHERE OF STATE TAXATION.

Petitioner has failed to demonstrate that any issue raised by this case is so likely to recur as to require review of the Florida decision. The Florida tax, repealed in 1987, has not been reenacted. Any such future imposition can only be analyzed based upon the particular facts and record which are thereby presented. Florida's Second District Court of Appeal applied well-settled legal principles in a manner entirely consistent with the relevant decisions of this Court in holding the Florida tax valid.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

KEVIN J. ODONNELL*
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
Tax Section, The Capitol
Tallahassee, FL 32399-1050
(904) 487-2142

*Counsel of Record

Dated:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

No. 92-1034

SEMINOLE ELECTRIC COOPERATIVE, INC.,

Petitioner,

vs.

FLORIDA DEPARTMENT OF REVENUE and GERALD R. LEWIS,
as Comptroller of the State of Florida,

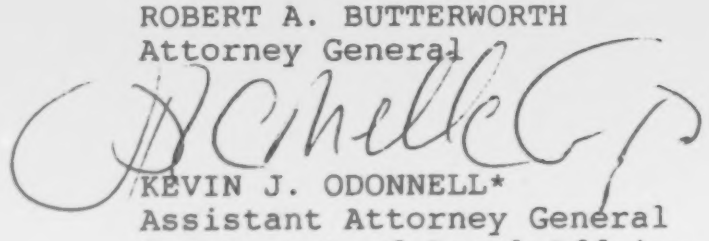
Respondents.

CERTIFICATE OF SERVICE OF
BRIEF IN OPPOSITION FOR RESPONDENTS

Pursuant to Supreme Court Rule 29.3, the undersigned hereby certifies that a true and correct copy of the Brief In Opposition for Respondents has been furnished by U.S. Mail to Robert A. Mora, Esquire, Richard A. Harrison and Wallace B. Anderson, Jr., ALLEN, DELL, FRANK & TRINKLE, 101 E. Kennedy Boulevard, Suite 1240, Post Office Box 2111, Tampa, FL 33602 this 19th day of January, 1993.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



KEVIN J. ODONNELL*
Assistant Attorney General
Department of Legal Affairs
Tax Section, The Capitol
Tallahassee, FL 32399-1050
(904) 487-2142

*Counsel of Record